Supreme Court, U.S.
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No. 94-294

In The

Supreme Court of the United States

October Term, 1994

IN RE
GEANA J. DUNKIN
AND
DAVID L. SMITH

Petition for Writ Of
Mandamus Or Prohibition

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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QUESTIONS PRESENTED FOR REVIEW*

1. Whether a petition for writ of mandamus or prohibition may be used in the absence of extraordinary circumstances, for the sole purpose of seeking to require the Clerk of the Supreme Court to engage in the futile act of filing a frivolous application for review by a single Circuit Justice of a previous order entered by the full Court?

2. Whether a party abuses this Court's procedures for seeking an extraordinary writ by attempting to relitigate issues, which have already been rendered the law of the case by this Court's prior rulings, under the guise of seeking a writ of mandamus or prohibition?

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* Respondents Louisiana-Pacific Corporation, James Beldin and Douglas Eddins respectfully submit a revised statement of the Questions Presented for Review pursuant to S. Ct. R. 15.1 and 24.2 (1994).

LIST OF PARTIES

The parties to the proceedings below were Petitioners Geana J. Dunkin and David L. Smith, and Respondents Louisiana-Pacific Corporation, James Beldin and Douglas Eddins.

Louisiana-Pacific Corporation does not have a parent company. Louisiana-Pacific Corporation's subsidiaries are Blue Skies Aviation, Inc., Ketchikan Pulp Company, Kirby Forest Industries, Inc., Louisiana-Pacific Corporation (W. Va.), Louisiana-Pacific Corporation de Mexico, S.A. de C.V., Louisiana-Pacific, S.A. de C.V., Louisiana-Pacific Foundation, Louisiana-Pacific International, Inc., Louisiana-Pacific Canada, Ltd., Louisiana-Pacific Trucking Company, Louisiana-Pacific Venture Corp., L-P Foreign Sales Corporation, and New Waverly Transportation, Inc. Louisiana-Pacific Corporation does not have any affiliate companies.

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STATUTES INVOLVED

Respondents acknowledge the question of whether an extraordinary writ of mandamus or prohibition should issue from this Court arises under the All Writs Act, 28 U.S.C. § 1651, which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aide of their respective jurisdiction and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

By Order of February 11, 1993, the United States Court of Appeals for the Tenth Circuit dismissed as premature two companion appeals by Geana J. Dunkin ("Dunkin") and her attorney, David L. Smith ("Smith"). *Dunkin v. Louisiana-Pacific Corp., et al.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993). The Tenth Circuit also imposed sanctions upon Smith because Smith had filed and pursued two frivolous appeals from separate sanction orders of the United States District Court for the District of Colorado. These interlocutory sanctions orders were not appealable under the clearly established law of the Tenth Circuit. *Id.* Having determined that sanctions should be imposed upon Smith, the Tenth Circuit remanded the case with directions to the District Court to determine in the first instance the proper amount of attorney's fees and costs to be awarded to Appellees. *Id.*

Smith and Dunkin then sought review in this Court, filing their Petition for a Writ of Certiorari on June 15,

1993, asking the Court to review the questions of: (1) whether an interlocutory order sanctioning counsel currently of record is immediately appealable under the collateral order exception to the final judgment rule; and (2) whether sanctions may be imposed against counsel for filing appeals where the clearly established law of the Circuit holds that the interlocutory sanction orders appealed from are not appealable on any basis, until after final judgment. On October 4, 1993, this Court entered the following Order: "Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit *denied.*" *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 87 (1993) (Case No. 92-1994) (emphasis added).

On May 18, 1994, Smith and Dunkin attempted to file their jurisdictionally defective Petition for Writ of Certiorari, attempting to bypass review in the Tenth Circuit and prematurely seeking review by this Court of a February 17, 1994 Order of the *District Court* which imposed sanctions of immediately payable attorney's fees of $17,506.50 and costs of $579.33 upon Smith pursuant to the Tenth Circuit's February 11, 1993 Order and Mandate in Case Nos. 92-1230 and 92-1381. *See Dunkin v. Louisiana-Pacific Corp.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 87 (1993). The attempts of Smith and Dunkin to file this premature Petition for Writ of Certiorari of May 18, 1994 have thus far failed, due to the commendable diligence of the Clerk of this Court.

Course of Proceedings in the District Court

Following this Court's denial of the Petition for Writ of Certiorari of Smith and Dunkin in Case No. 92-1994, *see Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 87 (1993), a hearing was had before the United States District Court for the District of Colorado, the Honorable Edward W. Nottingham presiding, on the issue of the amount of attorney's fees and costs to be awarded to Appellees as a sanction against Smith, pursuant to the Tenth Circuit's remand order in *Dunkin v. Louisiana-Pacific Corp. et al.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993). Following the hearing, the District Court imposed immediately payable monetary sanctions against Smith for attorney's fees of $17,506.50 and costs of $579.33, for the costs of defending the frivolous appeals in the Tenth Circuit to Louisiana-Pacific Corp., James Beldin and Douglas Eddins. (Petition for Writ of Mandamus or Prohibition (hereinafter "Petition"), at pp. 28-29.) Also, at the close of the February 17, 1994 hearing, the District Court stayed Dunkin's case "pending resolution of Mr. Smith's status by the Committee on Conduct," but the District Court did not vacate the March 28, 1994 jury trial date for the case.[1] *Id.*

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[1] The District Court's reference to the "status of plaintiff's counsel," referred to the fact that Smith is currently the subject of suspension proceedings before the Committee on Conduct of the District Court, in light of Smith's suspension from practicing before the Tenth Circuit. *See In re Smith*, 10 F.3d 723 (10th Cir. 1993), *cert. pending* (Petition for Writ of Certiorari filed March 31, 1994) (Case No. 93-1547).

On March 4, 1994, the final pretrial conference was held because trial was set to commence March 28, 1994. In light of the continuing uncertainty as to whether Smith was entitled to continue to practice before the District Court, and Smith's continuing failure to pay the sanctions imposed upon him by the District Court and the Tenth Circuit, there was no choice available to the District Court, other than to vacate the March 28, 1994 trial date and stay the proceedings. (Petition, at pp. 29-31.)

Disposition on Appeal

Smith and Dunkin have not pursued any appeal to the Tenth Circuit to seek review of the District Court's February 17, 1994 sanction order. Thus, the Tenth Circuit has had no opportunity to consider the issue of whether the *amount* of sanctions imposed upon Smith by the District Court is an appropriate sanction for Smith's filing and pursuit of two frivolous appeals to the Tenth Circuit. *See Dunkin v. Louisiana-Pacific Corp., et al.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993), *cert. denied* ___ U.S. ___, 114 S. Ct. 87 (1993).

While Dunkin did file a notice of appeal on March 17, 1994, asserting that she was appealing in *pro se* status, Dunkin sought review of only the District Court's *stay* orders of February 17, 1994, and March 4, 1994. Neither Dunkin nor Smith sought review of the District Court's sanction order of February 17, 1994, in the Tenth Circuit. Almost immediately, the Tenth Circuit directed the parties to brief the jurisdictional issue of "whether the [stay] order being appealed is an appealable order." (Petition, at p. 32.) On September 14, 1994, the Tenth Circuit entered

an Order dismissing Dunkin's appeal in Case No. 94-1130 for lack of jurisdiction. (App. at pp. 1-3.)

The attempts of Smith and Dunkin to bypass the Tenth Circuit and prematurely seek review in this Court of the *as yet unreviewed* sanction order of the *District Court* of February 17, 1994, have been unsuccessful, and properly so. The Clerk of this Court originally refused to file the Petition for Writ of Certiorari of May 18, 1994 of Smith and Dunkin, and returned it to Smith. (Petition, at pp. 38-39.) However, Smith and Dunkin, unwilling to accept appellate jurisdictional reality, re-sent this Petition to the Clerk, insisting that it be filed, and the Clerk again refused to file this jurisdictionally-defective Petition for Writ of Certiorari. (Petition, at pp. 39-40.)

Smith and Dunkin then filed in this Court an Application to Direct the Clerk to File Petition for Writ of Certiorari. The full Court disposed of this Application by Order of June 20, 1994, determining that the "motion to direct the Clerk to file a petition for writ of certiorari is denied." *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (1994).

On July 6, 1994, still unwilling to accept appellate jurisdictional reality, Smith and Dunkin attempted to file an Application for Review of Order Denying Motion to Direct the Clerk to File a Petition for a Writ of Certiorari. (Petition, at p. 41.) The Clerk of this Court properly refused to accept this second Application of Smith and Dunkin. (Petition, at pp. 42-43.) Smith and Dunkin responded by submitting, on July 15, 1994, a third Application, this time seeking an Order to direct the Clerk to

file their Application for Review of Order Denying Motion to Direct the Clerk to File a Petition for a Writ of Certiorari. (Petition, at p. 43.) On July 20, 1994, the Clerk of the Court returned to Smith and Dunkin their latest Application of July 15, 1994. As the Clerk explained to Smith, this "Application to Justice Ginsberg to review the order of the Court entered June 20, 1994 [had to] be returned since an individual Justice has no authority to review an order entered by the full Court." (Petition, at pp. 44-45.)

On August 17, 1994, Smith and Dunkin finally succeeded in cluttering this Court's docket with yet another frivolous pleading, filing at that time their Petition for Writ of Mandamus or Prohibition, seeking an order to direct the Clerk of this Court to file: (1) an Application which seeks review by an individual Justice of an Order of the full Supreme Court; and (2) the very Petition for Writ of Certiorari, the filing of which this Court refused to direct in its June 20, 1994 Order. *See Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (1994).

ARGUMENT

1. The Petition for Writ of Mandamus or Prohibition of Smith and Dunkin Does Not Present Any Exceptional Circumstances Warranting Exercise of the Court's Discretionary Powers and Adequate Relief Can Be Obtained After: (1) the District Court Enters a Final Judgment; and (2) the Tenth Circuit Reviews that Final Judgment.

Pursuant to S. Ct. R. 20.1 (1994), the primary considerations relied upon by this Court in determining whether to grant an extraordinary writ authorized by 28 U.S.C. § 1651(a) are:

> The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion *sparingly exercised*. To justify the granting of any writ under that provision, it must be shown that the writ will be in aide of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

S. Ct. R. 20.1 (1994) (emphasis added).

"It is, of course, well settled, that the writ [of mandamus or prohibition] is not to be used as a substitute for appeal, . . . even though hardship may result from delay." *Schlagenhauf v. Holder*, 379 U.S. 104, 110, 85 S. Ct. 234, 238 (1964) (citations omitted). *See also, In re Sindram*, 498 U.S. 177, 111 S. Ct. 596 (1991) ("*Sindram*"); *Kerr v. United States Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 96 S. Ct. 2119 (1976) (holding that mandamus would be inappropriate

where petitioners had an avenue far short of mandamus to achieve precisely the relief they sought); and *Will v. United States*, 389 U.S. 90, 88 S. Ct. 269 (1967) (Court stating that extraordinary writs "may not be used to thwart the congressional policy against piecemeal appeals" as mandamus does not " 'run the gauntlet of reversible errors' " because "[i]ts office is not to 'control the decision of the trial court' ").

In *Sindram*, this Court considered a petition for an extraordinary writ, which was strikingly similar in its pettifoggery as that which Smith and Dunkin are attempting to perpetrate on this Court. The *Sindram* Court found the petition for an extraordinary writ was abusive and frivolous, reasoning:

> *[T]he granting of an extraordinary writ is, in itself, extraordinary.* . . . On its face, this petition does not even remotely satisfy the requirements for issuance of an extraordinary writ. Petitioner has made no showing that 'adequate relief cannot be had in any other form or from any other court' as required by this Court's Rule 20.1. He identifies no 'drastic' circumstance to justify extraordinary relief. . . . Instead, he merely recites the same claims that he has presented to this Court in over a dozen prior petitions. Petitioner's request that we consider these claims yet again is both frivolous and abusive.
>
> . . . The goal of fairly dispensing justice . . . is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests. *Pro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the

> financial considerations – filing fees and attorney's fees – that deter other litigants from filing frivolous petitions. . . . *The risks of abuse are particularly acute with respect to applications for extraordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation.* In order to prevent frivolous petitions for extraordinary relief from unsettling the fair administration of justice, the Court has a duty to deny *in forma pauperis* status to those individuals who have abused the system.

Sindram, 498 U.S. at 178-179, 111 S. Ct. at 597-598 (emphasis added) (citations omitted).

Smith and Dunkin have failed to recognize that "the granting of an extraordinary writ is, in itself, extraordinary." *See Sindram*, 498 U.S. at 178, 111 S. Ct. at 597. Like the petition in *Sindram*, "on its face, this petition" of Smith and Dunkin "does not even remotely satisfy the requirements for issuance of an extraordinary writ." *See Id.* Conspicuously absent from the Petition of Smith and Dunkin is any explanation to this Court as to why Smith cannot obtain adequate relief regarding the *District Court's* February 17, 1994 sanction order in the form of review by the Tenth Circuit, following the entry of final judgment in the District Court. Accordingly, because Smith and Dunkin are incapable of making the requisite "showing that 'adequate relief cannot be had in any other form or from any other court' as required by this Court's Rule 20.1," *see Id.*, their Petition for an extraordinary writ should be denied.

2. The Clerk of this Court Properly Refused to Receive or File the Frivolous Applications of Dunkin and Smith to the Honorable Ruth Bader Ginsberg, Associate Justice of the Supreme Court of the United States, Because Such Applications Improperly Sought Review by a Single Circuit Justice of an Order of the *Full* Court.

Smith and Dunkin have sought the drastic remedy of an extraordinary writ for the wholly improper purposes of asking this Court to direct the Clerk of this Court to perform a futile act and to improperly reargue the very arguments which this Court rejected when the Court determined that the "motion to direct the Clerk to file a petition for certiorari is denied." *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (June 20, 1994). Smith and Dunkin claim that the refusal of the Clerk of this Court to receive or file their successive applications directed to Associate Justice Ginsberg is purportedly an "unwarranted" interference with their alleged First Amendment right to access to the Supreme Court.[2] (Petition, at p. 48.) This contention is utterly devoid of merit.

There is no such thing as a "First Amendment right" to access to this Court. "Access" to this Court is controlled by the statutes which define this Court's appellate jurisdiction. *See* 28 U.S.C. § 1254. Smith and Dunkin have

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[2] The argument of Smith and Dunkin in support of their Petition for Writ of Mandamus or Prohibition encompasses a grand total of one and one-half pages of their 52-page Petition and does not contain a single citation to authority. (Petition, at pp. 48 and 52.)

no right, much less a First Amendment right, to constantly harangue this Court and its Clerk with frivolous petitions, motions and applications. The Petition for an extraordinary writ of Smith and Dunkin is a graphic demonstration of the abuse which is "particularly acute with respect to applications for extraordinary relief," which threatens to "unsettl[e] the fair administration of justice" in this Court. *See Sindram*, 498 U.S. at 178, 111 S. Ct. at 597.

It is important to focus on the precise relief which Smith and Dunkin seek in their Petition for an extraordinary writ, that being an order from this Court to direct its Clerk to receive and file an Application directed to a single Justice of this Court, for the purpose of seeking review of an Order of the *full* Court. (Petition, at p. 48.) In *Kimble v. Swackhamer*, 439 U.S. 1385, 99 S. Ct. 51 (1978), Chief Justice Rehnquist entered a decision, as Circuit Justice, in which the Chief Justice refused an application requesting that he "summarily reverse" a judgment of the Supreme Court of Nevada. The Chief Justice reached this conclusion based upon reasoning which is compelling here:

> *It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court* of a State; a single justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits. . . . Since the likelihood that applicants' claim on the merits would induce four Justices of this Court to note probable jurisdiction on their appeal seems to me very remote, I find it unnecessary to deal

> with their contention that failure on the part of a single justice to grant some sort of interim relief will cause them irreparable injury.

Kimble, 439 U.S. at 1385-1386, 99 S. Ct. at 53 (emphasis added) (citations omitted). *See also, Blodgett v. Campbell*, ___ U.S. ___, 113 S. Ct. 1965 (1993) (Justice O'Connor, as Circuit Justice, holding that a single Circuit Justice lacked authority to unilaterally vacate the Ninth Circuit's en banc order remanding a habeas corpus proceeding for an evidentiary hearing).

The reasoning of Chief Justice Rehnquist in *Kimble* conclusively demonstrates the utter frivolity of the pending Petition for an extraordinary writ of Smith and Dunkin. Petitioners are asking this Court to direct the Clerk to engage in the futile act of filing an application for review by a single Circuit Justice of the June 20, 1994 Order of the *full* Court, *see Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (June 20, 1994), even though the law is so clear in this area that it "[i]t scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court of" the United States. *See Kimble*, 439 U.S. at 1385, 99 S. Ct. at 53.

The foregoing discussion shows clearly that there was nothing "unwarranted" about the Clerk's "interference" with the attempts by Smith and Dunkin to waste the time of Associate Justice Ginsberg with an application requesting that she single-handedly reverse the June 20, 1994 Order of the full Court. On the contrary, the Clerk properly ran interference for Associate Justice Ginsberg and this Court. The Clerk's refusal to accept the frivolous application of Smith and Dunkin, which sought reversal

by a single Circuit Justice of an Order of the full Court, was an eminently proper exercise of the Clerk's screening function. Indeed, the Clerk's refusal to accept the Application of Smith and Dunkin to Associate Justice Ginsberg furthered the "goal of fairly dispensing justice, [which] is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests." *See Sindram*, 498 U.S. at 178, 111 S. Ct. at 597.

3. The Petition for an Extraordinary Writ of Smith and Dunkin, which Asks the Court to Consider Again Claims which the Court has Already Rejected, is Frivolous and Abusive.

In their Petition, Smith and Dunkin list as their "reasons for granting the [extraordinary] writ" the very same arguments which the *full* Court rejected in determining that the "motion to direct the Clerk to file a petition for writ of certiorari is denied." *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (June 20, 1994). Thus, like the Petitioner in *Sindram*, Smith and Dunkin identify "no 'drastic' circumstance to justify extraordinary relief." *See Sindram*, 498 U.S. at 178, 111 S. Ct. at 597. "Instead, [they] merely recite[] the same claim[s] that [they have] presented to this Court" multiple times. *See Id. See also, Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 87 (1993); and *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (1994).

In disregard of this Court's June 20, 1994 Memorandum Decision, Smith and Dunkin have chosen to re-argue

that: (1) the Clerk of this Court "did not have the authority to refuse to receive or file Ms. Dunkin's and her attorney's (May 18, 1994) Petition for a Writ of Certiorari"; and (2) even if the Clerk did have such authority, the case was purportedly in the Tenth Circuit as required by 28 U.S.C. § 1254(1) for two asserted reasons: (A) the District Court was purportedly acting *on behalf of* the Tenth Circuit in entering its sanction order of February 17, 1994; and (B) Dunkin's *pro se* appeal of the District Court's stay orders of February 17, 1994 and March 4, 1994 was pending in the Tenth Circuit. (Petition, at pp. 46-47.) These contentions, which the Court has already rejected in its June 20, 1994 Memorandum Decision, are frivolous in the extreme.

In support of their incredible contention that the District Court was simply acting as some type of alter ego of the Tenth Circuit in determining the amount of sanctions to be imposed upon Smith pursuant to the Tenth Circuit's remand Order and Mandate of February 11, 1993, Smith and Dunkin cite the case of *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987). However, there is no language in the *Braley* decision which purports to transform the district courts of the Tenth Circuit into agents or alter egos of the Tenth Circuit whenever those district courts are directed on remand to determine the amount of sanctions to be imposed upon a litigant or their counsel for pursuing a frivolous appeal. The *Braley* court held only:

> After considering any excuses the attorney offers to justify his or her actions, the court generally will enter a final order rejecting or imposing sanctions and, if imposing, either establish the amount itself or remand to the

> district court for that determination. If fact issues arise from the response, affecting either the amount or whether sanctions should be imposed at all, the appellate court may delegate to the district court the task of resolving those issues.

Braley, 832 F.2d at 1515.

Simply because a court of appeals remands to a district court the issue of the amount of attorney's fees and costs to be awarded as a sanction for filing and pursuing an appeal which has found to be frivolous, this does not result in some magic transformation of the district court into an "agent" of the court of appeals. Contrary to the specious contention of Smith and Dunkin, the District Court was not "acting on behalf of the Tenth Circuit" (Petition, at p. 46) when the District Court entered its sanction order of February 17, 1994. Rather, in entering the February 17, 1994 sanction order, the District Court was acting pursuant to the Tenth Circuit's directive on remand that the District Court take the "further action"[3] of determining in the first instance the amount of attorney's fees and costs to be awarded in favor of Louisiana-Pacific Corporation, James Beldin and Douglas Eddins as a sanction for Smith's pursuit of two frivolous, jurisdictionally-defective appeals. *See Dunkin v. Louisiana-Pacific Corp., et al.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993).

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[3] It is elementary that the term "remand" means the "sending by the appellate court of the cause back to the same court out of which it came, for purposes of having some further action taken on it there." BLACK'S LAW DICTIONARY 1162 (5th ed. 1979).

No doubt Smith and Dunkin concocted this absurd contention that the District Court was "acting on behalf of the Tenth Circuit" in entering the sanction order of February 17, 1994, because it is the only way, albeit a wholly improper one, for Smith and Dunkin to attempt to seek immediate review of the District Court's February 17, 1994 sanction order. Smith and Dunkin have been told in no uncertain terms by the Tenth Circuit that interlocutory district court orders sanctioning counsel currently or record are not immediately appealable, with review of such sanction orders being deferred until an appeal following the entry of a final judgment on the merits. *See Id.*

Smith and Dunkin thus knew that if they filed an appeal to the Tenth Circuit from the District Court's February 17, 1994 sanction order, they would run a substantial risk of being further sanctioned for pursuing yet another frivolous, jurisdictionally-defective appeal. Rather than facing this prospect, Smith and Dunkin have attempted to completely bypass the Tenth Circuit by improperly seeking immediate review by this Court of an interlocutory district court order sanctioning counsel currently of record, even though it is clear as a matter of law that this Court has no jurisdiction to review the District Court's interlocutory sanction order of February 17, 1994, which has not been reviewed by the Tenth Circuit.

The second contention of Smith and Dunkin in support of their erroneous claim that the case is actually "in the United States Court of Appeals" for the Tenth Circuit (Petition, at p. 47) again shows conclusively why this Court does not have jurisdiction and, therefore, why this Court has already properly determined that the "motion to direct the Clerk to file a petition for writ of certiorari is

denied." *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (1994). Smith and Dunkin claim that this case is actually in the Tenth Circuit by virtue of Dunkin's alleged *pro se* appeal to the Tenth Circuit of the District Court's interlocutory, nonappealable stay orders of February 17, 1994 and March 4, 1994. This interlocutory appeal by Dunkin has recently been dismissed for lack of appellate jurisdiction in the Tenth Circuit. (App. at pp. 1-3.) Thus, Dunkin's appeal of the District Court's stay orders is no longer in the Tenth Circuit.

Moreover, Smith and Dunkin never provided this Court with any explanation as to how Dunkin's appeal of two *stay* orders could possibly have placed before the Tenth Circuit the District Court's *sanction* order of February 17, 1994. Dunkin and Smith have no explanation because neither Dunkin, nor Smith acting as her counsel in the Tenth Circuit in violation of the November 29, 1993 order suspending him from practicing in the Tenth Circuit, *see In re Smith*, 10 F.2d 723 (10th Cir. 1993), sought review in the Tenth Circuit of the District Court's February 17, 1994 sanction order. Accordingly, there is absolutely no basis upon which Smith and Dunkin can invoke this Court's discretionary jurisdiction under 28 U.S.C. § 1254.

Although nothing Smith and Dunkin attempt in this case should surprise Respondents by now, the contention of Smith and Dunkin at page 47 of their Petition that this is not a case where they have filed consecutive petitions for a writ of certiorari in violation of S. Ct. R. 44.4, is nothing short of ludicrous. The vast bulk of the Petition of Dunkin and Smith is devoted to challenges to: (1) the

District Court's multiple orders properly imposing monetary sanctions upon Smith; (2) the Tenth Circuit's determination that two earlier jurisdictionally-defective appeals of Smith and Dunkin were frivolous; (3) the Tenth Circuit's determination that sanctions should be imposed upon Smith for filing and pursuing those two frivolous appeals; and (4) the disciplinary order suspending Smith from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit or the District Court are paid, *see In re Smith*, 10 F.3d 723 (10th Cir. 1993),[4] which suspension order was the result of a separate and independent proceeding in the Tenth Circuit and as to which Smith has already filed a Petition for Writ of Certiorari in this Court (Case No. 93-1547). Therefore, this clearly is a case where consecutive petitions for writ of certiorari have been filed by Dunkin and Smith in violation of this Court's Rule 44.4.

Further, while Smith and Dunkin acknowledge that this Court previously denied, by Order of October 4, 1993, their Petition for Writ of Certiorari of June 15, 1993, Smith and Dunkin are either incapable of or too stubborn

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[4] With respect to the Tenth Circuit's suspension order, Smith and Dunkin take the incredible position in this separate proceeding, directly contrary to the sanction orders against Smith, that he "is not required to pay the sanctions imposed against him by the Tenth Circuit and the District Court if he exercises his 'option' of remaining suspended [and] he has been forced to exercise his 'option' of remaining suspended from the practice of law in the Tenth Circuit since November 29, 1993." (Petition, at pp. 49-50.) Even if Smith truly is exercising his "option" to remain suspended before the Tenth Circuit, this would not relieve Smith of his obligation to pay all sanctions imposed upon him by the District Court and the Tenth Circuit.

to recognize the legal effect of this Court's denial of their earlier Petition for Writ of Certiorari. In that earlier proceeding, Smith and Dunkin sought review in this Court of the Tenth Circuit's Order of February 11, 1993 in *Dunkin v. Louisiana-Pacific Corp., et al.*, Nos. 92-1230 & 92-1381, directly challenging the Tenth Circuit's determinations that: (1) their two jurisdictionally-defective appeals were frivolous; and (2) sanctions should be imposed upon Smith for filing and pursuing such frivolous appeals. This Court's denial of the June 15, 1993 Petition for Writ of Certiorari of Dunkin and Smith, *see Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 87 (1993), made the legal conclusions in the Tenth Circuit's February 11, 1993 Order "final and law of the case, and [Smith and Dunkin are] barred from attempting to relitigate them."[5] *Constant v. United States*, 929 F.2d 654, 657 (Fed. Cir. 1991). Clearly, the request of Smith and Dunkin

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[5] The fact that the Tenth Circuit's determinations that the two prior appeals by Dunkin and Smith were frivolous and that Smith should be sanctioned therefor are the law of this case fully disposes of the meritless contention of Dunkin and Smith that this Court's decision in the separate and distinct case of *McKnight v. General Motors Corp.*, ___ U.S. ___, 114 S. Ct. 1826 (1994) (sanction order by the United States Court of Appeals for the Seventh Circuit) somehow, apparently retroactively according to Smith and Dunkin, "rendered moot" the Tenth Circuit's decision in *Dunkin v. Louisiana-Pacific Corp., et al.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993). The *McKnight* Court did not purport to lay down an across-the-board rule governing when an appeal will be deemed frivolous and, therefore, sanctionable, nor did the *McKnight* Court give any indication that its decision was meant to be given retroactive effect or that such decision was intended to have any effect on the venerable law of the case doctrine.

that this Court "consider these claims yet again is both frivolous and abusive." *See Sindram*, 498 U. S. at 178, 111 S. Ct. at 597.

The August 15, 1994 request of Smith and Dunkin unequivocally demonstrates that they "have a greater capacity than most to disrupt the fair allocation of [the] judicial resources" of this Court. *See Id.* "In order to prevent [further] frivolous petitions for extraordinary relief" from Dunkin and Smith "from unsettling the fair administration of justice," *see Id.*, the Court would be fully justified in *sua sponte* imposing sanctions of "just damages and single or double costs" on Smith and Dunkin, pursuant to S. Ct. R. 42.2, and in directing the Clerk not to accept any further "Applications" or petitions for extraordinary writs pursuant to 28 U.S.C. § 1651(a), unless Smith and Dunkin first ask for and receive leave from the Court to make such a filing.

CONCLUSION

For all of the foregoing reasons, Respondents Louisiana-Pacific Corp., James Beldin and Douglas Eddins respectfully request that this Court enter an Order denying the Petition for Writ of Mandamus or Prohibition of Smith and Dunkin.

Respectfully submitted,

Louisiana-Pacific Corporation,
James Beldin and Douglas
Eddins, Respondents

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN, Plaintiff-Appellant, v. LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DOUGLAS EDDINS, Defendants-Appellees.	No. 94-1130

ORDER

(Filed Sept. 14, 1994)

Before LOGAN, ANDERSON, and KELLY, Circuit Judges.

This appeal is jurisdictionally defective because the order being appealed is not final. *See* 28 U.S.C. § 1291.

This is an appeal from an order of the district court staying the proceedings below until the status of plaintiff's counsel's right to practice before the district court is clarified.

A final decision is a decision that "ends the litigations on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). "A stay is not ordinarily a final decision for purposes of § 1291, since most stays do not put the plaintiff 'effectively out of court.' " *Moses H. Cone*

Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 10 n. 11 (1983); *See also Pioneer Properties, Inc. v. Martin*, 776 F.2d 888, 890-891 (10th Cir. 1985).

The appellant appears to argue that the order is an injunction, and thus appealable under 28 U.S.C. § 1292(a)(1). This argument is without merit. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988) ("An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)"). *See also Hamilton v. Robertson*, 854 F.2d 740, 741 (5th Cir. 1988). (There is "a clean distinction between injunctions prohibiting proceedings in other courts, which are appealable, and orders, whether or not styled 'injunctions,' that control proceedings only in the court that issues the order. The latter are not appealable[.]").

The appellees' Motion to strike Opening Brief for Plaintiff/Appellant and Appellant's Appendix and for Sanctions is denied in part, granted in part and referred in part. The request to strike the appellant's brief is denied. The request to strike the appellant's appendix is granted. *See* 10th Cir. R. 10.2.2. ("In pro se appeals . . . the clerk of the district court shall transmit the record to the clerk of the court of appeals . . . "). The request for sanctions is referred to the disciplinary panel.

The appeals' motion to file an appendix is denied. The appellees' Motion for Leave to File Supplemental

Appendix is denied without prejudice to being renewed before the disciplinary panel.

APPEAL DISMISSED.

Entered for the Court
PATRICK FISHER
Chief Deputy Clerk
By: /s/ Ellen Rich Reiter
Ellen Rich Reiter
Deputy Clerk/Appeals
Expediter